

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

VENICE GENOA TILE, LLC, an )  
Oregon limited liability )  
company, )  
Plaintiff, )  
v. )  
PANARIAGROUP Industrie )  
Ceramiche S.p.A., an )  
Italian corporation, )  
Defendant. )

No. 08-482-HU

FINDINGS AND  
RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Venice Genoa Tile (VGT) brought this action against  
defendant Panariagroup Industrie Ceramiche S.p.A., an Italian

FINDINGS AND RECOMMENDATION Page 1

1 corporation, asserting a contract claim for breach of the implied  
2 covenant of good faith and fair dealing. Defendant moves to dismiss  
3 for lack of personal jurisdiction, insufficient service of process,  
4 and the existence of another action on the same subject matter  
5 pending in Italy. Alternatively, Cotto d'Este moves to quash  
6 service of process and/or to stay this action pending the outcome  
7 of the action in Italy.

8 VGT is an Oregon and Washington limited liability corporation  
9 with its principal place of business in Vancouver, Washington. VGT  
10 also maintains a showroom, shop and offices in Portland, Oregon.  
11 Defendant Panariagroup Industrie Ceramiche (Panariagroup) is an  
12 Italian corporation doing business in Italy. Cotto d'Este Nuove  
13 Superfici (Cotto d'Este) is a division of Panariagroup.

#### 14 **Allegations of Complaint**

15 The complaint alleges that in the spring of 2006, VGT and  
16 Cotto d'Este negotiated for the purchase by VGT of a tile product  
17 called Kerlite. Complaint ¶ 5. VGT agreed to purchase Kerlite for  
18 distribution upon Cotto d'Este's representation that an exclusive  
19 distributor for Kerlite would not be appointed in the Pacific  
20 Northwest. Id. VGT developed a marketing and sales strategy for  
21 Kerlite. Id.

22 In August 2007, VGT placed an order for \$39,046.32 worth of  
23 Kerlite from Cotto d'Este. At the time the order was placed, VGT  
24 was unaware that Cotto d'Este had begun negotiations with a Seattle  
25 company for an exclusive distributorship agreement, an agreement  
26 executed in December 2007. Id. at ¶ 8. As a result, VGT alleges it

1 was unable to create a market for the Kerlite or price it  
2 competitively. Id. at ¶ 10. VGT rejected the shipment and refused  
3 to pay the invoiced amount. Id. at ¶ 11.

#### 4 **Jurisdictional Facts**

5 According to the Declaration of Francesco Pollastri, Cotto  
6 d'Este is a publicly traded Italian company doing business through  
7 offices and a warehouse located in the Modena province of Italy.  
8 Pollastri Declaration ¶ 5. All sales orders and contracts for the  
9 Cotto d'Este products are sent to its offices in Italy for  
10 approval. Id. at ¶ 7. If a sales order is approved, a confirmation  
11 of the order is sent to the customer from Cotto d'Este's office in  
12 Italy. Id. at ¶¶ 7, 14. After a sales order is approved, the  
13 customer is contacted to make arrangements for shipping. Id. at ¶  
14 14. Cotto d'Este has a policy of shipping its products Ex Works,  
15 which means that delivery occurs when Cotto d'Este places its goods  
16 at the disposal of the buyer at the seller's premises or another  
17 named place not cleared for export and not loaded on any collecting  
18 vehicle. See id. at ¶ 14, Exhibit 1 and Claudia v. Olivieri  
19 Footwear Ltd., 1998 WL 164824 (S.D.N.Y. 1998) (discussing meaning of  
20 Ex Works).

21 Cotto d'Este obtains some of its sales orders through brokers  
22 known as "sub-agents." Pollastri Declaration ¶ 7. Sub-agents are  
23 not employees of Cotto d'Este and typically represent a number of  
24 different manufacturers. When a sub-agent obtains a sales order,  
25 the order is forwarded to Cotto d'Este's Italian office for  
26 approval. Id. at ¶¶ 7, 14. Sub-agents do not have authority to  
27

1 accept orders on behalf of Cotto d'Este or to bind Cotto d'Este to  
2 contracts. Id. at ¶ 7.

3 Davide Marchesi is a broker or sub-agent for Cotto d'Este who  
4 sometimes works with customers in the United States. Id. at ¶ 14.  
5 See also Declaration of Davide Marchesi ¶ 3. Mr. Marchesi is a  
6 citizen of Italy, residing in Italy. Marchesi Declaration ¶ 2.  
7 Cotto d'Este is one of several manufacturers of ceramic, granite  
8 and marble products that Mr. Marchesi represents through his  
9 English company, Snow Mount. Id. at ¶ 3. Mr. Marchesi is not  
10 authorized to approve sales orders for Cotto d'Este, nor is he  
11 authorized to enter into any contracts on behalf of Cotto d'Este.  
12 Marchesi Declaration ¶ 8; Pollastri Declaration ¶¶ 7, 14. Mr.  
13 Marchesi submits all sales orders he receives to Cotto d'Este's  
14 office in Italy, for review and approval by Cotto d'Este. Marchesi  
15 Declaration ¶ 8; Pollastri Declaration ¶ 14. Mr. Marchesi is paid  
16 a sales commission on completed sales of Cotto d'Este's products.  
17 Marchesi Declaration ¶ 3.

18 Mr. Marchesi made a sales call on VGT in the spring or early  
19 summer of 2006, meeting with Mario Dodici, one of the owners of  
20 VGT, in VGT's Portland showroom. Marchesi Declaration ¶ 4. VGT did  
21 not order any Cotto d'Este products during this meeting. Id. About  
22 July 14, 2006, Adam Moiso, VGT's manager in Vancouver, Washington,  
23 sent an email to Mr. Marchesi in Italy, along with a small order  
24 for Cotto d'Este tile. Id. The order was forwarded to Cotto d'Este  
25 and approved, and the tile was delivered to VGT in Italy. VGT then  
26 had it shipped to Vancouver. Pollastri Declaration, Exhibit 1.

1 About June 20, 2007, Marchesi visited VGT in Vancouver,  
2 Washington. Marchesi Declaration ¶ 6. VGT did not place an order  
3 for Cotto d'Este products during that visit. Id. Two months later,  
4 on August 20, 2007, VGT placed an order through Marchesi. Complaint  
5 ¶ 7. The order was approved by Cotto d'Este about September 19,  
6 2007. Id.

7 At oral argument, counsel for VGT acknowledged that the 2007  
8 order was received in Vancouver, Washington. All correspondence for  
9 the transaction was directed to or from VGT's Vancouver location.  
10 Pollastri Declaration ¶ 15, Exhibit 1. VGT has refused to pay the  
11 invoiced amount of \$39,046.32.

12 In January, February and March 2008, emails between the  
13 parties and demand letters from VGT's lawyers went back and forth.  
14 On April 15, 2008, Cotto d'Este caused a Writ of Summons to be  
15 issued from the Modena Court in order to commence an action in  
16 Italy against VGT for the unpaid invoice (the Italian action).  
17 Trincherro Declaration ¶ 2, Exhibit 1. The Writ of Summons includes  
18 the complaint translated into English demanding payment for the  
19 tile. Id. On April 18, 2008, Cotto d'Este filed a lawsuit in the  
20 Modena Court. Id. at ¶ 3, Exhibit 2.

21 The complaint was filed in this case by VGT on April 18, 2008.  
22 Summons was issued on April 24, 2008. (Doc. ## 1, 3). On April 29,  
23 2008, VGT attempted to serve the summons and complaint upon Cotto  
24 d'Este by having Cindy Hovestadt, a process server in Orlando,  
25 Florida, leave them with an employee of Cotto d'Este in a  
26 Panariagroup booth at a trade show held Orlando. Trincherro

1 Declaration Exhibit 6. The affidavit of service signed by Ms.  
2 Hovestadt on April 29, 2008, says:

3       Service was perfected at the Orange County Convention  
4       Center stall as instructed. The Salesman served confirmed  
5       he was an employee of Panariagroup Industrie Ceramiche  
6       S.P.A. but would not provide his name (description of  
      employee is provided with this affidavit.) The employee  
      stated that he would ensure the business owner received  
      the documents that day.

7       Id. The salesman served by Ms. Hovestadt was Francesco Pollastri.  
8       Declaration of Francesco Pollastri ¶ 8. Mr. Pollastri states in his  
9       declaration that he is not an officer or director of Cotto d'Este,  
10      nor is he a registered agent or authorized by Cotto d'Este to  
11      accept service on its behalf. Id. at ¶¶ 4, 12. He is, however, a  
12      full-time salaried employee of Cotto d'Este, its Overseas Sales  
13      Director. Id. at ¶¶ 3, 4.

14       According to Mr. Pollastri's declaration, a woman entered the  
15      Cotto d'Este booth "holding an unmarked envelope." Id. at ¶ 10. When  
16      he asked who she was and what her purpose was, she responded by  
17      "telling me it did not matter who she was because she was just  
18      there to leave some papers." Id. She asked Mr. Pollastri his name,  
19      but because the woman refused to identify herself, Pollastri  
20      refused to give his name. Id. The woman then handed him the  
21      envelope and left the booth without asking any more questions. Id.  
22      Mr. Pollastri states that at no point did he tell her he was an  
23      employee of Panariagroup, that he was authorized to accept service,  
24      or that he would provide the documents to the owner of the  
25      business. Id. at ¶ 11.

26      ///  
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1 The Writ of Summons from the Modena Court was served on VGT  
2 May 6, 2008. Id. at Exhibit 3. On May 7, 2008, VGT mailed its  
3 complaint and service documents to Cotto d'Este. The Italian action  
4 is currently pending in the Modena court, with trial set for  
5 February 2, 2009. Trinchero Declaration ¶ 2, Exhibit 1.

### 6 Standards

7 When a defendant's motion to dismiss is made as its initial  
8 response and the court is asked to decide the motion without  
9 conducting an evidentiary hearing, plaintiff need only make a prima  
10 facie showing that personal jurisdiction exists, *i.e.*, facts that,  
11 if true, would support the court's exercise of jurisdiction over  
12 the defendant. Mattel, Inc. v. Greiner and Hauser GMBH, 354 F.3d  
13 857, 862 (9<sup>th</sup> Cir. 2003). Unless directly contravened, plaintiff's  
14 version of the facts is taken as true; conflicts between the facts  
15 contained in declarations submitted by the two sides are resolved  
16 in plaintiff's favor. CE Distribution, LLC v. New Sensor Corp., 380  
17 F.3d 1107, 1110 (9<sup>th</sup> Cir. 2004). The court need not decide whether  
18 plaintiff has proven its contentions, but only whether it has made  
19 a prima facie case for personal jurisdiction. Mattel, 354 F.3d at  
20 862.

21 VGT asserts that specific jurisdiction exists over Cotto  
22 d'Este. Specific jurisdiction requires three things: 1) the non-  
23 resident defendant must purposefully direct its activities or  
24 consummate some transaction with the forum or a resident of the  
25 forum, or perform some act by which it purposefully avails itself  
26 of the privilege of conducting activities in the forum, thereby

1 invoking the benefits and protections of its laws; 2) the claim  
2 must be one which arises out of or relates to the defendant's  
3 forum-related activities; and 3) the exercise of jurisdiction must  
4 comport with fair play and substantial justice, *i.e.*, it must be  
5 reasonable. Yahoo! Inc. v. La Ligue Contre le Racisme et  
6 L'Antisemitisme, 433 F.3d 1199, 1205 (9<sup>th</sup> Cir. 2006). If plaintiff  
7 satisfies the first two prongs of this test, defendant must present  
8 a "compelling case" that exercising personal jurisdiction would not  
9 be reasonable. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d  
10 797, 802 (9<sup>th</sup> Cir. 2004).

11 Purposeful availment" and "purposeful direction" are two  
12 distinct concepts: a purposeful availment analysis is most often  
13 used in contract actions, while a purposeful direction analysis is  
14 most often used for actions in tort. Id.

### 15 Discussion

#### 16 A. Purposeful availment

17 The existence of a contract with a resident of the forum state  
18 is itself insufficient to satisfy the purposeful availment  
19 requirement. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79  
20 (1985). This prong of the minimum contacts test requires a  
21 "qualitative evaluation" of the defendant's contact with the  
22 foreign state, and is met if the defendant engaged in "some type of  
23 affirmative conduct which allows or promotes the transaction of  
24 business within the forum state." Harris Rutsky & Co. Ins. Serv. v.  
25 Bell & Clements, 328 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2003). Thus, prior  
26 negotiations and contemplated future consequences, along with the  
27



1 terms of the contract and the parties' actual course of dealing are  
2 among the factors to be considered. Burger King, 471 U.S. at 479.

3 Guidelines relevant to this determination include: 1) who  
4 initiated the contact; 2) the origin and destination of the goods;  
5 3) the value of the goods involved in the disputed transaction; 4)  
6 the number of contacts defendant had with the forum; 5) where  
7 contract negotiation occurred; and 6) prior dealings or future  
8 consequences anticipated between the parties that relate to the  
9 contract in dispute. Naumes, Inc. v. Alimentos Del Caribe, 77 F.  
10 Supp.2d 1158, 1163 (D. Or. 1999); Glenn Walters Nursery, Inc. v.  
11 Kenly Farms, 2007 WL 845908 (D. Or. 2007).

12 The initial contact in this case appears to have been by Mr.  
13 Marchesi. VGT asserts that Mr. Marchesi "held himself out to be a  
14 sales agent working for" Cotto d'Este and that it was "always  
15 Plaintiff's understanding and belief that Mr. Marchesi was employed  
16 by Defendant." The actions of Mr. Marchesi and "plaintiff's  
17 understanding and belief" are not relevant to the jurisdictional  
18 analysis, because jurisdictional contacts must proximately result  
19 from actions by the defendant itself. Burger King, 471 U.S. at 475.  
20 Mr. Marchesi's actions are not actions by Cotto d'Este, and there  
21 is no indication that Cotto d'Este promoted VGT's belief that Cotto  
22 d'Este employed Mr. Marchesi.

23 Similarly, although VGT contends that it anticipated future  
24 contracts with Cotto d'Este, including a possible sole  
25 distributorship for Kerlite, there is no indication that Cotto  
26 d'Este anticipated such future transactions. In fact, VGT's  
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1 allegation that Cotto d'Este entered into an exclusive  
2 distributorship contract for the Pacific Northwest with a vendor in  
3 Seattle suggests an intention on the part of Cotto d'Este *not* to  
4 engage in future transactions in Oregon. VGT's marketing  
5 activities, advertising, and purchases of Kerlite for future sale  
6 in Oregon are not jurisdictional contacts by Cotto d'Este and  
7 therefore have no jurisdictional relevance.

8 The orders were placed by VGT, some months after the contacts  
9 by Mr. Marchesi. Contract negotiations appear to have occurred  
10 between Italy and Washington. The goods originated in Italy and  
11 their destination was Vancouver, Washington. The value of the goods  
12 was relatively small--approximately \$40,000.

13 None of the Naumes factors favors VGT.

14 VGT contends that specific personal jurisdiction is  
15 established pursuant to Or. R. Civ. P. 4D, which provides for  
16 jurisdiction

17 [i]n any action claiming injury to person or property  
18 within this state arising out of an act or omission  
19 outside this state by the defendant, provided in addition  
20 that at the time of injury, either: 1) [s]olicitation or  
21 service activities were carried on within this state by  
or on behalf of the defendant, or 2) [p]roducts,  
materials, or things distributed, processed, serviced, or  
manufactured by the defendant were used or consumed  
within this state in the ordinary course of trade.

22 VGT argues that it satisfies these requirements because it has  
23 alleged a property injury within the state and an act or omission  
24 outside the state by the defendant, *i.e.*, "the Italian Defendant's

1 intentional misrepresentation of its distribution model").<sup>1</sup> VGT  
2 relies on Oregon cases that deal with causes of action arising, at  
3 least in part, from the commission of tortious acts in the state.  
4 But the "purposeful direction" theory used for tort cases is  
5 different from the "purposeful availment" theory used for claims  
6 sounding in contract.

7 Rule 4D is inapplicable for several reasons. First, there is  
8 no evidence that VGT sustained an injury to property "within this  
9 state," *i.e.*, in Oregon. The damages claimed by VGT as a result of  
10 the alleged false representations about exclusive distributorship  
11 include shipping and customs duties and lost profits on  
12 contemplated sales of the Kerlite products. There is no allegation  
13 that any of these damages represent harm to property "within this  
14 state;" the existence of VGT's principal place of business in  
15 Washington indicates that any financial consequences of the alleged  
16 misrepresentation were sustained in Washington.

17 Rule 4D's "at the time of the injury" requirement is not met  
18 here. The complaint does not identify when the alleged intentional  
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20 <sup>1</sup>VGT's contention that the basis of its claim against Cotto  
21 d'Este is an "intentional misrepresentation" (a tort) is  
22 inconsistent with its single cause of action for breach of  
23 contract. Further, the claim asserted here, for breach of the  
24 implied covenant of good faith and fair dealing, is designed to  
25 "effectuate the reasonable contractual expectations of the  
26 parties." Best v. United States National Bank, 303 Or. 557, 562.  
27 Only the objectively reasonable expectations of the parties to  
the contract will be examined in determining whether the  
obligation of good faith has been met. Uptown Heights v.  
Seafirst, 320 Or. 638 (1995) (en banc). There is no allegation  
that the tile order at issue in this case created any objective  
expectation of an exclusive distributorship, or that one would  
not be established.

1 misrepresentation about not having an exclusive distributor was  
2 made. Thus it cannot be determined whether the misrepresentation  
3 was made at the time of the contract at issue here, or with  
4 reference to it. Similarly, it cannot be determined whether the  
5 representation was false when made (*i.e.*, after the exclusive  
6 distributorship agreement with the Seattle company had been  
7 executed).

8       The requirement of "solicitation or service" activities in  
9 Oregon is dubious at best. Mr. Marchesi appears to have first  
10 visited VGT in the spring of 2006, on apparently his only visit to  
11 Oregon. Later and at separate times, VGT placed two tile orders  
12 from Washington. The allegedly breached contract--the second tile  
13 order--was placed in August 2007, over a year later, and  
14 approximately two months after Mr. Marchesi made a sales visit to  
15 VGT in *Vancouver, Washington*. The parties agree that VGT took  
16 delivery of the tile in Italy. The tile was shipped Ex Works and  
17 its ultimate destination was Washington.

18       The "purposeful availment" element of personal jurisdiction is  
19 not satisfied here.

20 B.   "Arises under"

21       Cotto d'Este asserts that VGT has also failed to show that its  
22 claims arise out of forum-related activities, arguing that VGT  
23 alleges only two transactions with Cotto d'Este, with the  
24 activities underlying the transactions occurring in Washington and  
25 Italy, not Oregon. Cotto d'Este points out that VGT's principal  
26 place of business is in Washington; the tile was ordered in  
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1 Washington; both transactions were invoiced to Washington; and the  
2 products were delivered to VGT in Italy and shipped by VGT to  
3 Washington. Cotto d'Este argues that other than the fact VGT is  
4 registered as an Oregon LLC, there is no connection between the  
5 negotiations and transactions for the second tile shipment, or the  
6 alleged misrepresentations, and the state of Oregon.

7       The standard for the "arising out of" requirement is whether  
8 the claim arises out of or results from *defendant's* forum related  
9 activities. There is no evidence, or any allegation in the  
10 complaint, that the dispute about the alleged misrepresentations  
11 over exclusive distributorships arose out of any conduct by Cotto  
12 d'Este in Oregon. Nor, as discussed, does the dispute about payment  
13 on the contract for the second shipment arise out of activities by  
14 Cotto d'Este in Oregon.

15       I conclude that specific jurisdiction over Cotto d'Este does  
16 not exist in Oregon, because VGT has not satisfied either the  
17 "purposeful availment" requirement or the "arising out of"  
18 requirement. Because neither requirement is met, it is unnecessary  
19 to consider whether Cotto d'Este has made a "compelling case" that  
20 the exercise of personal jurisdiction would be unreasonable. It is  
21 also unnecessary to consider Cotto d'Este's alternative argument  
22 based on insufficient service of process. I recommend that this  
23 action be dismissed for lack of jurisdiction.

24       C. Action pending in Italy

25       If a reviewing court disagrees that this action should be  
26 dismissed for lack of personal jurisdiction, I recommend that the  
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1 action be stayed pending the outcome of the action in Italy.

2 Courts have inherent power to dismiss or stay an action  
3 pending resolution of a related foreign proceeding. Landis v. North  
4 Am. Co., 299 U.S. 248, 254 (1936); Cohen v. Carreon, 94 F. Supp.2d  
5 1112, 1115 (D. Or. 2000).

6 Both parties have cited to the court a case from  
7 Massachusetts, Goldhammer v. Dunkin Donuts, Inc., 59 F. Supp.2d  
8 248, 252-53 (D. Mass. 1999), which lists several factors guiding  
9 the court's discretion. They include 1) similarity of parties and  
10 issues; 2) promotion of judicial efficiency; 3) adequacy of relief  
11 in the alternative forum; 4) issues of fairness to and convenience  
12 of the parties, counsel and witnesses; 5) possibility of prejudice  
13 to any of the parties; and 6) temporal sequence of the filing of  
14 the actions.

15 Cotto d'Este asserts that all these factors favor staying this  
16 action pending resolution of the Italian action. I agree. The  
17 parties and issues are the same. The goods were manufactured in  
18 Italy by an Italian company. There is no reason to believe a  
19 judgment from Italy would not be enforceable in the United States,  
20 based on the Uniform Enforcement of Foreign Judgments Act. Or. Rev.  
21 Stat. § 24.105 *et seq.* Counsel for VGT acknowledged that its  
22 principals immigrated to the United States from Italy and speak  
23 Italian. Inconvenience to one of the parties is inevitable, whether  
24 the action is tried in Italy or Oregon. The Italian action was  
25 initiated first, because it commenced when service of summons was  
26 issued on April 15, 2008. The present action was filed at 4:24

1 Pacific Daylight Time on April 18, 2008, which was 1:24 a.m. April  
2 19, 2008 in Modena, Italy.

3 Accordingly, I recommend that if the reviewing court is not  
4 inclined to dismiss this case for lack of personal jurisdiction, it  
5 stay the action pending the outcome of the Italian action.

6 **Scheduling Order**

7 The above Findings and Recommendation will be referred to a  
8 United States District Judge for review. Objections, if any, are  
9 due October 9, 2008. If no objections are filed, review of the  
10 Findings and Recommendation will go under advisement on that date.  
11 If objections are filed, a response to the objections  
12 is due October 23, 2008, and the review of the Findings and  
13 Recommendation will go under advisement on that date.

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15 Dated this 24<sup>th</sup> day of September, 2008.

16  
17 /s/ Dennis James Hubel

18 Dennis James Hubel  
19 United States Magistrate Judge  
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